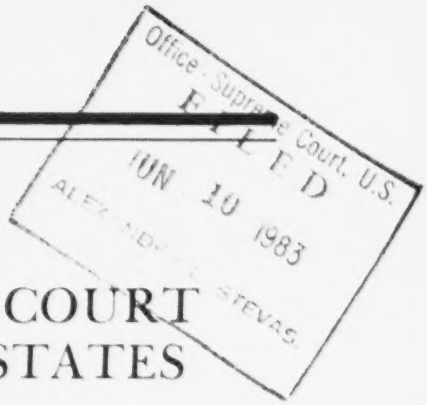

No. 82-1886

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

F. LANGWITH BERRY, Petitioner

v.

EARL C. BERGER, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court filed June 29, 1982 (App. B of Petition) is unreported. The Order of the Circuit Court of Appeals for the District of Columbia Circuit filed March 28, 1983 (App. A of Petition) is unreported.

JURISDICTION

The Jurisdiction requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Under the doctrine of res judicata do the fruits of an erroneous judgment forever enure to the benefit of a party after reversal?

STATEMENT OF THE CASE

Petitioner's presentation of the factual basis of this petition is substantially accurate and is accepted by the respondent.

ARGUMENT

"Berry's claim is untenable," so said the U.S. Court of Appeals for the District of Columbia Circuit in its unreported Order of March 28, 1983. (App. A of Petition)

The United States Supreme Court should not have its good office used as an instrument to be manipulated so that an unsuccessful litigant may reap a windfall. Yet, after reading petitioner's brief, one cannot escape the fact that this is the bottom line of his argument.

Petitioner relies primarily upon this Court's decision in *Federated Department Stores, Inc. et al.* v. *Marilyn Moitie and Floyd R. Brown, et al.*, 452 US 394, 69 L. Ed. 2d 103, 101 S Ct 2424 (1981).

In relying upon *Moitie,* Petitioner overlooks the principal question raised by the majority of this Court which was:

> . . . whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of res judicata (452 US 395).

In narrowing this issue, the Court did not foreclose recognition that *"exceptions"* to the doctrine of res judicata do exist and may be applied in a proper set of circumstances.

The real thrust of the *Moitie* decision is found at 452 US 400 where this Court invoked the strict application of the res judicata doctrine so as to prevent a "windfall" to the litigants who sought an unwarranted advantage. An *exception* to the strict application of the doctrine must be made in favor of Respondent in this appeal, for Petitioner would otherwise reap a windfall and would be unjustly enriched.

Counsel for Respondent would do violence to the Memorandum Opinion (App. B of Petition, unreported) of U.S. District Judge Thomas A. Flannery if an attempt was made to improve upon it. For this reason, Counsel adopts

Judge Flannery's opinion as the basis for Respondent's argument and herewith quotes it in full.

MEMORANDUM OPINION

This matter is before the Court on Intervenor Berry's motion for summary judgment. Mr. Berry seeks to secure enforcement of a California lien judgment out of funds currently on deposit in the Registry of the Court. For the reasons expressed below, the motion is denied.

Facts

On June 9, 1978, a Superior Court in California entered judgment in a malicious prosecution action in favor of Berry and against Berger in the amount of $600,000 plus interest and costs. Berger filed a notice of appeal from the judgment on July 21, 1978, but failed to obtain a stay of execution of the judgment.

On June 27, 1978, on the strength of the malicious prosecution judgment, Berry initiated a creditor's action in California Superior Court, with the purpose of impressing a lien on the *March v. United States,* No. 3437-70 (1970), attorney's fees. On July 19, 1978, the Superior Court entered an order placing a lien on the joint venture interest of Berger to the extent of the judgment debt. On September 11, 1978, on the basis of plaintiff's failure to respond to certain discovery requests, the court entered a default judgment against Berger. Finally, on October 17, 1978, the court entered summary judgment against Berger impressing his interest in the fees with intervenor's judgment.

Complicating matters substantially, on April 16, 1981, Berry's malicious prosecution judgment was reversed by the California Court of Appeals. The court concluded that a portion of the action was barred by the statute of limitations and that summary judgment was inappropriate with

respect to the remainder of the action. The court remanded the case to the Superior Court without expressly ordering that the parties be returned to their pre-litigation positions.

This court granted Berry's renewed motion to intervene on September 9, 1980. Berry was permitted to intervene solely for the purpose of "attempting to enforce the California judgment and creditor's lien against Earl C. Berger in funds now in the court's registry . . ." The instant motion followed the court's final determination that plaintiff's recovery is limited to one-half of the gross attorneys fees recovered in *March v. United States*. The motion contends that the court is obligated to enforce the final, unappealed California lien judgment regardless of the reversal of the underlying malicious prosecution judgment.

Discussion

This court is required, of course, to give full faith and credit to a final, valid judgment rendered by a court of competent jurisdiction in a sovereign state. U.S. Const. art. IV § 1; Restatement (Second) of Conflict of Laws §§ 92,93 (1971). A necessary corollary, however, is that the court may decline to enforce a state judgment if equitable relief could render the judgment a nullity in the state in which it was rendered. *Id.*, at § 115, Comment a; Restatement (Second) of Judgments § 82 (1982). In other words, the judgment need be given no greater effect in the tribunal where enforcement is sought than in the state where the judgment issued.

Close questions as to the enforceability of foreign state judgments are ordinarily resolved in favor of enforcing the judgment or requiring the judgment debtor to return to the rendering state for adjudication of the continuing validity of the

judgment. Annot., 55 A.L.R.2d 673 (1957); Restatement (Second) Conflict of Laws § 115 (1971). This reflects the principle, consistent with the Full Faith and Credit Clause, that there should be maximum deference to the court issuing the judgment as the most appropriate forum for considering the judgment debtor's request for equitable relief. Other factors relevant to the determination whether to defer to the forum where the judgment originated include the residency and convenience of the litigants, *see, e.g., Schoenbrod v. Siegler,* 20 N.Y.2d 403, 283 N.Y.S.2d 88.230 N.E.2d 638 (1967); *Hoverstad v. First Nat'l Bank & Trust Co.,* 76 S.D. 119, 74 N.W.2d 48 (1955), the presence or absence of competing equities that must be weighed, *see, Bros Inc. v. W.E. Grace Mfg. Co.,* 320 F.2d 594 (5th Cir. 1963); *compare Wyman v. Newhouse,* 93 F.2d 313 (2d Cir. 1937), *cert. denied,* 303 U.S. 664 (1938) with *Baker v. Erbert,* 199 Kan. 59, 427 P.2d 461 (1967), and the existence of evidentiary questions that can most easily be resolved in the judgment state. *See Stephens v. Thomasson,* 63 Ariz. 187, 160 P.2d 338 (1945); *James v. Francesco,* 61 N.J. 480, 295 A.2d 633 (1972); *Klaiber v. Frank,* 9 N.J. 1, 86 A.2d 679 (1952); *Consumer Credit Co. v. Bowers,* 143 W.Va. 748, 104 S.E.2d 869 (1958).

The judgment liens at issue are valid, final judgments which have never been appealed by Mr. Berger. California rules of Court, Rule 2a. Contrary to Mr. Berger's assertion, the lien judgments are not automatically void by operation of the reversal of the malicious prosecution judgment. *See Reed v. Allen,* 286 U.S. 191 (1932); Restatement (Second) Judgments §41.3 (1982); *see also Federated Dept. Stores, Inc. v. Moitie,* ___U.S.___, 101 S.Ct. 2424 (1981). Accordingly, the court can only refuse to enforce the California lien judgments if it concludes that a California

court, confronted with similar circumstances, would withhold enforcement.

California courts have recognized a number of devices for avoiding onerous and inequitable judgments. First and foremost, parties may employ the analogue of Federal Rule of Civil Procedure 60(b) in order to vacate or set aside a judgment. See Cal. Civ. Proc. Code §473 (West) (the court "may, upon such terms as may be just, relieve a party from judgment taken against him ..."); *see generally Hummel vs. Hummel,* 326 P.2d 542 (1958); *Weinberger v. Manning,* 123 P.2d 531 (1942). In addition, a litigant may request the court reviewing the underlying judgment to return the parties to the positions they occupied before enforcement of or execution on the judgment. Cal. Civ. Proc. Code § 908 (West); *see Holmes v. Williams,* 273 P.2d 785 (1947). When these options are unavailable, the party may initiate a suit to set aside an inequitable judgment. *See Young v. Young Holdings Corp.*, 27 Cal. App. 2d 129, 80 P.2d 723 (1938); *In Re Marriage of Coffin,* 133 Cal. Rptr. 583, 63 Cal. App.3d 139 (1976); *Wechsler v. United States,* 128 Cal. Rptr. 619, 56 Cal. App. 3d 574 (1976); *Preston v. Wyoming Pacific Oil Co.,* 17 Cal. Rptr. 443, 197 CA 2d 517 (1962) (power to vacate judgment in separate lawsuit exists independent of statute); *cf. Desper v. King,* 59 Cal. Rptr. 657, 251 Cal. App.2d 659 (1967) (when statutory remedy is unavailable, challenge may be made to default judgment in separate equitable action or by motion based on equitable grounds in same action).

Further, it appears that a California court, faced with the circumstances involved here, would refrain from enforcing the judgment liens. It is a venerable tenet of California jurisprudence that "[w]hen a judgment is reversed on appeal,

the appellant is entitled to restitution of *all rights* from him under the judgment." *Greve v. Leger, Limited*, 42 Cal. Rptr., 464, 232 Cal. App.2d (1965), *rev'd on other grounds*, 415 P.2d 824 (1966) (Emphasis supplied); *see Coldwell, Banker & Co. v. Dept. of Ins.*, 162 Cal. Rptr. 487, 102 Cal. App.2d 381 (1980) (reversal of trial court's judgment requires parties to be returned as close as possible to position occupied prior to rendering of erroneous judgment); *Levy v. Drew*, 50 P.2d 435 (1935) ("[i]t is well settled in California that when a judgment is reversed on appeal the appellant is entitled to restitution of *all things* taken from him under the judgment . . .") (Emphasis supplied); *Raun v. Reynolds*, 18 C.275 (1861) (when a judgment is reversed, it must be treated as if it were never rendered); *see also Lapique v. Plummer*, 50 Cal. App. 88, 94, 195 P. 293 (1921); Cal. App. 504, 4P.2d 181 (1931); *Thomas v. Lavery*, 125 Cal. App. 666, 14 P.2d 158 (1932); *Clarke v. Baird*, 98 Cal. 642, 33 P.756 (1893). Applying this hoary principle, California tribunals consistently hold that parties must return "money inadvertently paid in satisfaction of a judgment which no longer existed," *Department of Public Works v. Richman*, 51 Cal. Rptr. 454, 458 (1966); *see Coldwell, Banker & Co. v. Dept. of Ins.; Raun v. Reynods*, regardless of the manner in which the money has been procured. *Levy v. Drew*, 50 P.2d 435 (1935) (the "defendant had no right to retain the money collected under the execution after the judgment upon which it *was issued had been* vacated"). The compelling theory underlying this unbroken line of precedent is that it is manifestly unjust to "permit one who has collected money upon a judgment later reversed to retain the same . . ." *Rogers v. Bill & Vince's Inc.*, 33 Cal. Rptr. 129, 131 (1963).

Consideration of this uniform body of authority reveals that a California court would not lend its stamp of approval to the lien judgments at issue here. The lien judgments were obtained entirely on the basis of the malicious prosecution judgment subsequently reversed. The injustice of enforcing a lien predicated upon an erroneous judgment is obvious. The survey of California law set out above demonstrates that a California court would do its utmost to avoid this injustice by returning the parties to the positions they occupied before the underlying judgment was rendered. Since the lien judgments flowed directly and exclusively from the malicious prosecution judgment, restoration of the parties to their initial positions necessarily includes a refusal to enforce the lien judgments.

In fact, a decision by this court to enforce the lien judgments would almost certainly be negated by subsequent action in California. If funds presently on deposit are actually released to Berry in satisfaction of his lien, the California authorities cited above suggest that Berger could successfully initiate and prosecute an action for restitution of the money. Thus, allowing Berry to now enforce his lien would not only run counter to the equities which have motivated California courts but would obligate a California tribunal to become embroiled in a basically unnecessary legal proceeding. It is clear, therefore, that a *refusal* to enforce the lien judgments involved here would be most consistent with the interests of comity and deference that underlie the Full Faith and Credit Clause.

In sum, this court is required to give a California judgment only that full faith and credit which a California court would lend to the judgment. Following a review of relevant California law, the court concludes that a California

court would, on equitable grounds, decline to enforce the lien judgments relied upon by the intervenor despite the apparent validity of those judgements.[1]

Accordingly, the court also refrains from enforcing the liens on the *March* attorneys fees and denies intervenor Berry's motion for summary judgment.

An appropriate Judgment accompanies this Memorandum Opinion.

/s/ Thomas A. Flannery

United States District Judge

Following Judge Flannery's Opinion, the United States Court of Appeals for the District of Columbia Circuit made short-shift of Petitioner's appeal to that court. Its Order (App. A of Petition—Unreported) rejected the appeal as follows:

ORDER

On consideration of appellee's motion for summary affirmance and appellant's motion for summary reversal, it is

ORDERED by the Court that summary affirmance is granted. For the reasons cogently stated by the District Court in its June 29, 1982,

[1]Because analysis of whether a California court would approve of the lien judgments at issue does not present a close issue, there is no need to consider the other factors material to the decision whether to enforce a judgment rendered by another state. If those factors were scrutinized, they would undoubtedly favor a refusal to enforce the lien judgments. The grounds for challenging the lien judgment do not require consideration of evidentiary materials easily accessible to a California court. In addition, neither of the principle adversaries, Berger or Berry, has complained that this is an inconvenient forum for resolution of the matter at hand. Finally, the court can discern no important competing equities which favor enforcement of the lien judgments. *See Michigan Surety Co. v. Service Machinery Corp.*, 277 F.2d 531 (5th Cir. 1960).

Memorandum Opinion, intervenor-appellant Berry's claim is untenable; plaintiff-appellee Berger, therefore, is entitled to expedited action. *See Walker v. Washington*, 621 F.2d 541 (D.C. Cir. 1980); *United States v. Allen*, 408 F.2d 1287 (D.C. Cir. 1969).

CONCLUSION

It is obvious that this petition is without merit; that petitioner is seeking a windfall and unjust enrichment and is asking this Court to enforce a lien which is not enforceable under California law. The appellate court aptly said: "Berry's claim is untenable."

The petition should be denied.

Dated: June 10, 1983

DANIEL L. O'CONNOR, JR.
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the annexed BRIEF FOR RESPONDENT IN OPPOSITION was mailed, postage prepaid, to Thomas M. Burton of Hunter, Peterson and Burton, Suite 1001, Union Bank Building, 99 Almaden Boulevard, San Jose, California 95413, attorney for Petitioner, F. Langwith Berry, this 10th day of June, 1983.

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